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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of Telecommunications Services Inside Wiring Customer Premises Equipment	CS Docket No. 95-184
In the matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Cable Home Wiring	MM Docket No. 92-260

REPLY COMMENTS OF AMERITECH ON FURTHER NOTICE OF PROPOSED RULEMAKING

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October 6, 1997

CS Docket No. 95-184

COMMENTS OF AMERITECH ON FURTHER NOTICE OF PROPOSED RULEMAKING

Table of Contents

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Summary

In its opening Comments, Ameritech New Media, Inc., supported the rules changes proposed by the Commission in its Further Notice of Proposed Rulemaking pertaining to cable inside wiring installed in MDU buildings by MVPDs. However, Ameritech also suggested certain improvements that could be made in the rules. In particular, Ameritech contended that the proposed waiting period of sixty days to allow incumbent providers to make up their mind what to do about their unit-by-unit inside wiring (or ninety days for building-by-building) would be far too long and would thwart vigorous competition. Other parties have made similar comments. There is no need for any sort of "cooling-off period" before competition is allowed to begin in earnest.

Ameritech also continues to urge the Commission to clarify the proposed exemption for pre-existing "legally enforceable rights" to make clear that any such rights must pre-date the proposal of the new rules, thus closing the door to the negotiation of any future agreements expressly intended to evade the new rules. In the same vein, the Commission should proceed to adopt its new proposal for future contracts requiring the ownership of inside wire to be vested

in the building owner, although Ameritech also has proposed modifications and improvements for that rule.

Several comments from incumbent cable interests pointed out that incumbents who are notified by MDUs that an alternate MVPD has appeared should be able to choose — in addition to sale, abandonment, or removal of their wiring, as presently proposed in the Notice — a fourth option of seeking to vindicate in the state courts their "rights" to exclude competitors. Ameritech opposes such an additional option, but shows herein that if such an option is adopted, it must be modified, in cases where the incumbent has commenced its state proceedings, to allow the alternate provider to take temporary possession of the wiring during the pendency of such proceedings, if that is the subscriber's wishes and the state court does not order otherwise.

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I. The Commission Has Ample Legal Authority To Require Cable Operators To Sell or Abandon "Home Run" Wiring.

Ameritech New Media, Inc. ("Ameritech") concurs in the Comments of GTE which support the Commission's authority, under Section 623 of the Communications Act, to establish a framework for the disposition of MDU home run wiring upon termination of service. (GTE at pp. 13–14) In order to fulfill the Section 623 mandate of reasonable basic cable rates, and to carry out Congress' stated "preference for [fostering] competition" among service providers as a means of acheiving this goal, it is necessary for the FCC to adopt procedures regarding the disposition of MDU home run wiring. In the absence of these rules, incumbent cable providers will continue to engage in dilatory practices which deter the MDU owner from considering alternate service providers. Under the 1996 Act, the Commission can act to preclude conduct which impedes competition and the deployment of innovative technologies and services to consumers. Ameritech urges the Commission to carry out these mandates and promote competition in the provision of cable services to MDU occupants through implementation of the amended procedural framework suggested by Ameritech.

II. Incumbents Claiming the Exemption for Pre-Existing Enforceable Rights Should Not Be Permitted To Stay the Application of the Commission's Rules.

In the opening round of Comments, Ameritech and many other parties expressed their disappointment that the rules the Commission is proposing for the disposition of home run wiring will apply only when the incumbent cable operator "does not (or will not at the conclusion of the notice period) have a legally enforceable right to remain on the premises against the wishes of the entity that owns the common areas of the MDU." The rules thus seem to give Commission sanction to the large storehouse of very long-term, perpetual agreements accumulated by incumbent providers. However, these harmful effects are partially dispelled by the fact that the Commission now appears poised to address this issue, having stated its intent that "the competitive impact of exclusive service contracts" will be addressed in "in subsequent action in this docket." Notice, ¶ 3.

Because the Commission has thus decided to defer the question of abolishing the exemption for "legally enforceable rights" that can prevent application of the home run wiring rules, there remains an immediate present need to deal with the exemption in the everyday practical world. The comments filed by the various parties generally voice a multi-part chorus of disdain for the vagueness and uncertainty that would be engendered by the rule in the form in which it has been proposed. Particular criticism is directed against the Commission's proposed "presumption" that an incumbent does not have a legally enforceable right to remain on the premises. Adelphia at pp. 14–16; NCTA at pp. 21–22; Time Warner pp. 62–67; Jones pp. 12–15.[1]

Moreover, many of the commenters suggest that the rules need some additional enhancement that would provide for the prompt resolution of these state claims in state courts. NCTA, for example,

[1] Also, U S West believes (pp. 9–11) that "[t]here is no basis upon which the Commission may establish a presumption as to whether a court will decide if a cable operator is likely to have an enforceable right to continue providing service to a particular property."

argues (p. 15) that the proposed rules do not address the "crux of the matter," which is that often it is unclear whether a legally enforceable right to remain on the premises exists. Thus, NCTA proposes (pp. 20–21) a fourth option that would be available to incumbent cable operators when they receive notice that the MDU owner has decided to permit competition: in addition to choosing among abandonment, sale, or removal, the incumbent may also, under the NCTA proposal, elect to notify the MDU owner of the incumbent's intent to initiate a state court proceeding within thirty days to resolve any dispute over its rights.[2]

Ameritech agrees that such a proposal, with certain modifications, could have certain pro-competitive advantages. The incumbent will be the party claiming paramount rights under state law, so it should be compelled to go into state court to vindicate those rights if it can.[3] Of course, if it does not elect the state litigation option, or if it elects that option and fails to file its suit within the thirty days,

[2] Similar proposals are made by TCI at pp. 12–14; Cablevision at pp. 20–21; U S West at pp. 9–10.

[3] Contrary to the boastful claims currently being voiced before the Commission, the incumbent providers' rights are often exposed in the state courts as paper tigers. For example, in Metropolitan Cablevision v. Cox Cable Cleveland, 78 Ohio App. 3d 273, 604 N.E.2d 765 (1992), it is held that despite the incumbent's retention of a contractual right to remove, the intention of the parties is to be determined with reference to the fact that the cable is never actually so removed, but is regarded as not worth the cost of removal, and that therefore the cable becomes a fixture, *i.e.*, a part of the real estate, and may be used by the owner (or a subsequent provider) as the owner pleases.

that option should thereafter be unavailable to it, and the Commission should not adopt rules embodying the NCTA proposal unless those consequences are clearly stated.

Furthermore, such a rule would inject no undue additional delay into the competitive process in the many cases where the incumbent elects *not* to sue. This may indeed prove to be the large majority of cases.[4] On the other hand, in the cases where the incumbent does actually elect to initiate proceedings in the state courts, the proposed NCTA rule, which provides for a "stay" of all timetables and procedures, will, unless modified as Ameritech proposes below, greatly delay the achievement of the goals of competition and customer choice that are at the heart of these proceedings. The state court litigation may drag on for months or years, during which time the incumbent will still be in exclusive possession of the home run wiring and home wiring *even* if that is against the express wishes of the actual cable subscriber.

Ameritech therefore submits that if anything like the NCTA "fourth alternative" is adopted, the interests of the Commission's nationwide objective to promote customer choice and cable competition require that the rule be modifed to place the *customer's* choice

[4] Ultimately, of course, this will depend on the nature of the underlying agreement, whether the same form of agreement has already be tested in the same state, as well as the respective inclinations toward litigiousness on the part of the incumbent and alternate MVPD).

—that is, the alternate provider, rather than the incumbent — in possession of the inside wire while any state court proceedings remain pending. This proposed modification of the NCTA proposal would not involve any "presumption" of fact or law that might seem to pre-judge the ultimate outcome any of the issues that might be litigated in state court. Instead, it merely shifts the burden of going forward to seek from the state court a decision as to who is entitled to temporary possession. In the case (for example) of unit-by-unit competition[5] it would, during the pendency of the state court proceedings that the incumbent provider has initiated, put the alternate provider in possession of the end user's home run wiring just as the end user wishes, subject, of course, to any contrary ruling by the state court, if the incumbent provider is able to obtain one.

Under this modification, then, the Commission's rules should state that wherever an end user prefers the services of an alternate MVPD provider and the MDU owner consents, the alternate provider may elect, by giving written notice to the incumbent, to make temporary use of the home run wiring and home wiring for the purposes of providing service to that particular end user, unless and

[5] The discussion which follows uses unit-by-unit competition as an example since that is the main focus of Ameritech New Media in these proceedings, but the same rule could and should be applied to building-by-building competition.

until the state court hearing the incumbent's claim orders some other arrangement by means of a preliminary injunction or similar mandatory process.[6] During this period the Commission's rules should further require the incumbent MVPD to rely exclusively upon its state judicial remedy and not resort to any self-help or breach of the peace (such as interference with the alternate provider's use of the wire).

If the final decision of the state court is that the incumbent MVPD does not have any remaining "enforceable rights," the Commission's rules should require the incumbent to make its usual election among sale, abandonment, or removal, except that in cases where the alternate MVPD had elected the option of making use of the wiring during the pendency of the state court proceedings, and the state court had not ordered otherwise, the Commission's rules should provide that the incumbent's option of removal was foreclosed in order that the alternate MVPD may continue to use the wiring without interruption. On the other hand, if the state court's final decision sustains the incumbent's claim of "enforceable rights," then the Commission's rules would have no further application except, in cases where an alternate MVPD had elected to

[6] Of course, under the usual rules applicable in such cases, no such preliminary injunction would be issued unless it appeared (among other things) that there was a reasonable probability that the incumbent provider would succeed.

make temporary use of the home run wiring and home wiring and the state court had not ordered otherwise, to require the alternate MVPD to surrender possession of that wiring.

Clearly, the "fourth alternative" of litigation, as proposed by NCTA and others, should *not* be adopted unless the foregoing procompetitive modifications are made.

III. The Exemption for Pre-Existing Enforceable Rights Should Not Apply to New Agreements.

In addition to its other undesirable effects that have already been discussed, the exemption for "legally enforceable rights," when read literally, not only applies to the huge inventory of exclusive agreements that incumbent MVPDs have already accumulated, but also appears to allow them to continue to negotiate *new* long-term exclusive agreements, with *new* "legally enforceable rights," and thereby evade the Commission's new MDU disposition policies forever. Even though few other parties commented on it, Ameritech continues to believe that this gushing leak in the new rules should be plugged and that the Commission should clarify or change the language of the exemption to make clear that the "legally enforceable rights" that may be asserted to preclude application of the MDU disposition rules must be rights that were already in existence when those rules were adopted.

IV. The Proposed Unit-by-Unit and Building-by-Building Processes Are Too Slow To Permit Vigorous Competition.

In its opening Comments, Ameritech contended that the Commission's proposed rule for the unit-by-unit disposition of home run wiring and home wiring is far too generous in allowing so much time, once the MDU owner has decided to permit unit-by-unit competition, for an incumbent cable provider to make known its single choice, applicable to the entire building, whether it will remove, abandon, or sell its inside wire. Ameritech pointed out that under existing rules applicable to single-family homes, the incumbent is required to make its choice almost instantaneously, and that there was no reason why a considerably longer time should be required to make the same choice for an MDU, particularly when the time would probably not be spent in deciding, but in marketing efforts trying to preserve the tenants' business.

Other parties in their initial Comments have sought to draw the Commission's attention to this important issue. Leaco Rural Telephone Cooperative states (at p. 4) that the unit-by-unit process should be shortened by reducing the incumbent's election period to two days. The Independent Cable TV Association proposes that in the unit-by-unit scenario the incumbent should be entitled to only fifteen days notice from the MDU owner, with a fifteen-day election period thereafter. If it elects to abandon, then such election is effective immediately and removal should occur in seven days, with a maximum of thirty days to negotiate a sale. (pp. 7–8) SBC Communications would reduce an incumbent's election period to fourteen days (pp. 3–4). Building Owners/Managers support shortened deadlines for both building-by-building (less than 90 days) and unit-by-unit(less than 30 days) incumbent elections (p. 7). RCN concurs in shortening time periods generally (p. 13). In stark contrast, there was no one, not even among the entrenched incumbent providers, who argued that the time frames were too short.

The comments thus establish unanimously that incumbent providers do not need such a long time to make up their minds about inside wire, and certainly, should not from a marketing viewpoint, be given so much advance warning that a competitor has appeared. The arrival of competition for cable service is, after all, a good thing. There is no reason to treat it like the threat of a work stoppage, where a "cooling-off period" is sometimes thought necessary. Thus the Commission should cut back the proposed rules' time limits.

V. The Demarcation Point Need Not Be Moved Any Further Upstream.

Philips and Thompson state in their Comments (p. 12) that "[t]he most procompetitive option for the FCC to consider is moving the MDU cable demarcation point to the lockbox just outside the building." However, Ameritech submits this proposal goes farther than is ordinarily necessary for the protection of competition. The demarcation point need not be moved any further upstream than the lockbox location where the facilities first become solely dedicated to serving a particular end user. This lockbox can be either physically inside or outside the building. Moreover, whatever might be the value of using some other demarcation point further upstream in a building-by-building competitive situation, in the case of unit-by-unit competition, demarcation at a place other than the point where the facilities are first dedicated to the individual's use could interfere with the service provided by the incumbent to other subscribers still served by the incumbent.

VI. The Commission Should Establish a Presumptive Guideline for the Sale Price of Inside Wire.

The Notice asked whether the Commission should establish some "guidelines, a default price, a general rule or formula" (¶ 37) for the sale of inside wire. Ameritech suggested in its opening Comments that the Commission ought to refer to the general guideline of six cents per foot that currently applies to the sale of inside wire in single-family premises.

The comments of the incumbent cable interests do not agree with one another on this point. Time Warner argues that any such price will become a de facto ceiling for payments. Time Warner also says the incumbent must be given the opportunity for a *de nova* adjudication of just compensation in order to avoid process contravening the Fifth Amendment (p. 42). Adelphia Cable rejects the idea of an FCC default price, and states that if the parties can't agree on a price, they should submit to binding arbitration under the Commission's alternative dispute resolution process. (p. 28)

On the other hand, NCTA supports a default price. NCTA claims the proposed rules remove any incentive for the MDU owner or alternative MVPD providers to accept an incumbent operator's offer to sell (p. 23). NCTA proposes that if an incumbent's offer to sell at a "reasonable price" is declined, the incumbent need not make any further election between removing or abandoning the wire. The "reasonable price" could be a "default price" or a range of default prices. Alternatively, once an operator elects to sell, that election should stop the clock unless the MDU owner demonstrates that the operator failed to negotiate in good faith. Jones cable (pp. 18–19); TCI agrees (pp. 15–19) stating MDU owners and MVPDs have "nothing to lose and everything to gain by forestalling negotiations until they know whether the incumbent is willing to remove or abandon the wiring." (p. 15) Cablevision would have FCC establish a "formula" that would set the price equal to the cost for the alternate provider to install a second home wire, including labor and

materials. Adoption of a formula, it says, will ensure the parties can reach agreement on cost (p. 17). Cable Telecom Association calls for a reasonable default price where the MVPD elects to sell and the parties cannot agree on price. This price should reflect "actual cost to replace inside wiring and be determined on the number of units passed . . . [not] original cost less amortization." (pp. 11–13).
U S West (pp. 12–13) supports a default price based on the cost to the new provider to put in its own wiring (both labor and materials). A refusal to accept a reasonable offer from the incumbent would allow incumbent to retain ownership of the wiring and continue to restrict its use.

The solutions proposed in most of these comments are too complicated and impractical. Who is to determine, in the case of a particular building, under the time frames that would be involved, that an offer to sell at a given price that is turned down by the alternate provider was "reasonable" all along? Moreover, the NCTA proposal goes beyond the question of pricing posed by the Notice and would change the burden in the negotiations from that which the Commission has proposed.

Accordingly the Commission should adopt a simple presumptive rate such as the six cents per foot that is already in use. It is only the inherently nominal value of the wire that needs to be considered, not its former installation costs or opportunity costs, and the six cents is an entirely adequate presumed rate.

VII. The MDU Owner's Written Consent Should Not Be Required for Access to Existing Molding Or Conduit.

The Notice (¶ 83) proposed to permit alternative service providers to install their home run wiring within existing molding or conduit, even over the incumbent provider's objection, where there is room in the molding or conduit and the MDU owner does not object. Ameritech supported this proposed rule and agreed with the tentative conclusion that such a rule would promote competition and consumer choice and would not constitute a taking of the incumbent provider's private property without just compensation under the Fifth Amendment.

The rule as proposed by the Commission would apply only if the building owner does not object to the installation. Surprisingly, however, the building owners themselves, insofar as they are represented by the comments of Building Owners and Managers Association International, *et al.*, find a way to assert that the rule would be "the source of much mischief" (p. 6). Evidently this is because they fear that alternative MVPD providers could occupy the molding or conduit secretly, depriving the building owners of their right to object while still seeming to comply with the Commission's rule. Thus, it is said that alternative providers would have "an incentive to assert a right to enter and install wiring without the owner's knowledge" (*id.*).

Ameritech was not planning to read the rule as minutely as the Building Owners Comments seem to fear. Therefore Ameritech would offer no objection to changing the phrase "if the building owner does not object" in the presently-proposed version of the rules to say "if the building owner knowingly consents." At the same time, however, Ameritech does not agree that such consent should have to be made in writing, which would inject far more formality than necessary to deal with wiring that will be installed invisibly, within molding or conduit that is already in place. Obviously, of course, this point would be covered in the discussions leading up to the decision to allow unit-by-unit competition, and the MDU owner's consent would be obtained at that time.

VIII. Ownership of Inside Wire in Future Installations Should Be Transferred to the MDU Owner.

The Notice also sought comment (¶ 85) whether video service providers should hereafter be required to transfer ownership of home wiring and home run wiring to the MDU owner. Many of the comments opposed such an idea. Ameritech, however, believes that such a rule would promote competition, and accordingly it continues to support a modified form of the Commission's proposal under which an MVPD installing new wire in an MDU building, although it would be denied exclusive ownership of the wire, would still retain enough interest in the wire to make it worthwhile to install it. Under this plan, the Commission would adopt rules that would apply these conditions to the installation of cable inside wire in MDU buildings:

1. The MVPD must dedicate ownership of the inside wiring to the MDU owner free of charge;

2. The MVPD may not require the MDU owner to grant to the MVPD the exclusive right to use the inside wire; and,

3. The MVPD may require the MDU owner to agree that for a term of years no exclusive right to serve the building's occupants will be granted to any other MVPD.

Allowing the MVPD to negotiate to obtain a fixed minimum term as the non-exclusive provider would both protect the MVPD from confiscation, but at the same time preclude it from exacting an exclusive or monopoly right to serve the tenants of the building in perpetuity. Unit-by-unit competition would be possible immediately, and of course in that case, the regular unit-by-unit MDU disposition rules would apply whenever a competitor appeared to compete on a unit-by-unit basis. Ameritech continues to support this rule for future buildings.

IX. Conclusion

For the above and foregoing reasons, Ameritech submits that the Commission should adopt the rules proposed in the Notice, subject to the modifications suggested in Ameritech's Comments and in these Reply Comments.

Respectfully submitted,

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October 6, 1997

CERTIFICATE OF SERVICE

I, Edith Smith, do hereby certify that a copy of Ameritech's Reply Comments has been served on the parties on the attached service list, via first class mail, postage prepaid, on this 6th day of October, 1997.

By: Edith Smith

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